

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

**WILLIAM ROBINSON, a/k/a
BILLY C. ROBINSON,**

Plaintiff-Appellant,

Vs.

Davidson Law 95C-59
C.A.No. 01A01-9510-CV-00434

JAMES R. OMER, SR.,

Defendant-Appellee.

FILED

May 24, 1996

**Cecil W. Crowson
Appellate Court Clerk**

FROM THE THIRD CIRCUIT COURT OF DAVIDSON COUNTY

THE HONORABLE BARBARA N. HAYNES, JUDGE

Winston S. Evans, Evans, Jones & Reynolds of Nashville
For Appellee

Robert L. Callis of Mt. Juliet
For Appellant

REVERSED IN PART, AFFIRMED IN PART AND REMANDED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This case involves allegations of negligent misrepresentation, outrageous conduct, and invasion of privacy. Plaintiff William Robinson appeals from the trial court's order granting summary judgment to defendant James Omer as to all three claims.¹

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Omer filed a Motion to Dismiss under Tenn.R.Civ.P. 12.02; however, because the parties presented materials outside the pleadings for the court's consideration, the trial court properly treated the motion as one for summary judgment.

The facts of this case, as alleged in Robinson's amended complaint, supported by affidavits and depositions, are as follows: In approximately 1986, Robinson, a contractor, agreed to construct an office building in Mt. Juliet, Tennessee, for Dewey Lineberry, a local businessman. Lineberry decided to include a camera room with two way mirrors in his building. He told Robinson he was concerned that women with whom he had sexual encounters might falsely accuse him of rape. By having filmed recordings of his sexual encounters, Lineberry believed he would protect himself from such allegations.

Defendant, James Omer, is a licensed Tennessee attorney who represented Lineberry on various occasions between the mid-1970's and 1990. According to Robinson's amended complaint, Omer advised Lineberry, prior to the construction of the office building, that both creating a taping room with two way mirrors and secretly taping sexual encounters could be legally done. Lineberry's affidavit states that Omer and Lineberry together came up with the idea of building the hidden taping room with two way mirrors. Lineberry also states that Omer suggested that Lineberry enlist Robinson to act as the cameraman. Lineberry admits that he never told Omer that he in fact decided to use Robinson for the job. According to both Robinson and Lineberry, Lineberry on one occasion called Omer for the purpose of reassuring Robinson of the legality of secretly videotaping his [Lineberry's] sexual encounters and Omer, who had been told by Lineberry that Robinson was in the room, again told Lineberry that such activity was legal. Robinson asserts that Omer knew or should have known that Robinson, or others similarly situated, was privy to and relied upon Omer's advice that it was "legally permissible" to videotape Lineberry's sexual encounters without the consent of the women involved. In electing to act as Lineberry's cameraman, Robinson claims that he justifiably relied on Omer's advice.

Lineberry's affidavit also states that prior to 1992, Omer contacted Lineberry, promising Lineberry a fee should Lineberry refer cases to Omer. According to Lineberry, he in fact did refer a personal injury case to Omer, and that case resulted in a large settlement. Omer reportedly refused to pay Lineberry the agreed fee, as a result of which Lineberry reported Omer to the Tennessee Board of Professional Responsibility (TBPR). According to Lineberry, when Omer discovered that Lineberry reported him to the TBPR, Omer, in retaliation, contacted Tom Thompson, District Attorney General for Wilson County, Tennessee, and informed Thompson

of the existence of Lineberry's hidden camera room with two way mirrors and the fact that Lineberry secretly videotaped women during a lingerie party. Although Omer did not specifically mention Robinson at that time, it is clear from Thompson's deposition that Thompson knew a third party was involved. Subsequent to receiving this information, Thompson issued a search warrant for Lineberry's office and home, which revealed the existence of several videotapes, as well as Robinson's involvement as Lineberry's cameraman. The Wilson County sheriff's office contacted the women who were secretly taped, and they subsequently filed civil suits against Lineberry and Robinson, allegedly damaging plaintiff².

The complaint alleges:

As a result of these lawsuits and Omer's negligent misrepresentations, Robinson incurred substantial damages by way of being required to hire attorneys to defend him and by way of having to pay out substantial sums by way of settlement for the invasion of the privacy of the four (4) women. Additionally, as a result of the public disclosure of the videotaping and Robinson's involvement therein and Omer's negligent misrepresentations, Robinson was caused to suffer other serious and substantial damages and injuries, including, but not by way of limitation, emotional distress, damage to reputation, injury to business's owned by Robinson by way of loss of business and income, all of which will be shown to the Court at a hearing of this cause.

I.

A trial court should grant a motion for summary judgement when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn.R.Civ.P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). On a motion for summary judgment, the trial court and the appellate court must consider the matter in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party and discard all countervailing evidence. *Id.* at 210-11. The phrase "genuine issue" as stated in Tenn.R.Civ.P. 56.03 refers to genuine, factual issues and does not include issues involving legal conclusions to be drawn from the facts. *Id.* at 211. In *Byrd*, the

²No criminal charges were filed against Robinson or Lineberry.

court stated:

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn. 1978); *Merritt v. Wilson Cty. Bd. of Zoning Appeals*, 656 S.W.2d 846, 859 (Tenn. App. 1983). In this regard, Rule 56.05 provides that a nonmoving party cannot simply rely upon his pleadings but must set forth **specific facts** showing that there is a genuine issue of material fact for trial. “If he does not so respond, summary judgment . . . shall be entered against him.” Rule 56.05 (Emphasis in original).

II.

Robinson’s issue on appeal is whether the trial court erred in granting Omer’s motion for summary judgment regarding Robinson’s claims of negligent misrepresentation, outrageous conduct, and invasion of privacy. We consider Robinson’s claim of negligent misrepresentation first.

Tennessee has adopted the principles set forth by the American Law Institute in the *Restatement (Second) of Torts*, § 552 (1977) regarding the liability of professionals, including attorneys, who negligently supply false information that is used by others in their business transactions. *Stinson v. Brand*, 738 S.W.2d 186,191 (Tenn. 1987). The *Restatement (Second) of Torts*, § 552 (1977) provides, in pertinent part:

Information Negligently Supplied for the Guidance of Others:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The testimony of both Robinson and Lineberry establishes that Omer was Lineberry’s attorney; that Lineberry sought advice concerning the videotaping from Omer; and that Omer,

as Lineberry's attorney, advised Lineberry that the videotaping was "legally permissible" and was much like "keeping a diary." The proof also establishes that Omer knew Robinson, or at least some third person, would act as cameraman in reliance upon Omer's representation, and that Robinson did, in fact, act as the cameraman in reliance upon the representation of Omer. As provided for in the *Restatement (Second) of Torts*, § 552, an attorney's duty to use due care in supplying information may extend to third parties with whom the attorney is not in privity. *Collins v. Binkley*, 750 S.W.2d 737, 739 (Tenn. 1988); *Stinson v. Brand*, 738 S.W.2d 86, 191 (Tenn. 1987).

The record reveals genuine issues of material fact. Whether Omer supplied information, whether he failed to use due care in so doing, whether his liability would extend to Robinson pursuant to Paragraph 2, *Restatement (Second) of Torts*, § 552, and whether Robinson justifiably relied upon the information are disputes for the trier of fact and are not appropriate for summary judgment. Omer asserts that extending the potential liability of attorneys to nonclients, under the circumstances presented in this case, would impose an "intolerable burden on the practice of law." We disagree. It is well-settled that an attorney may be liable to a limited group for whose benefit he knows or should know his advice is intended. *Stinson*, 738 S.W.2d at 191; *see also Bethlehem Steel Corp. v. Ernst & Winney*, 822 S.W.2d 592 (Tenn. 1991); *John Martin Co. v. Moore/Diesel, Inc.*, 819 S.W.2d 428, 435 (Tenn. 1991).

Omer also argues that Robinson, knowing that his conduct was wrong, cannot now assert that he justifiably relied upon Omer's alleged advice. This argument is without merit. Morally reprehensible conduct and conduct that is legally prohibited are not one and the same. Equally irrelevant, in the same vein, is Omer's allegation that Robinson cannot claim reliance upon Omer's alleged advice because Robinson actually enjoyed videotaping Lineberry's encounters.

Omer further contends that this Court cannot rely on Robinson's affidavit because it is inconsistent with the statement Robinson gave at the Wilson County Sheriff's Department. *See, e.g. Thomas v. Gary Yeomans Ford Motor Co.*, No. 03A01-9411-CV-00396, 1995 WL 364263 (Tenn. App. E.S. June 20, 1995). Our review of the record, however, reveals that Robinson's affidavit and confession are not inconsistent. Furthermore, we do not find, as Omer contends, that Robinson's affidavit presents a set of facts too incredible to be accepted by reasonable

minds.

III.

We next consider whether Omer's actions in reporting Lineberry's activities to the Attorney General, and as a consequence exposing Robinson to civil liability, constitute outrageous conduct. We agree with the trial court's determination that it does not.

In order to successfully assert a claim for outrageous conduct in Tennessee, the plaintiff must establish, first, that the conduct is so outrageous that it is not tolerated by civilized society and second, that the conduct complained of resulted in serious mental injury. *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 479, 398 S.W.2d 270, 274 (1966). Although "outrageous conduct" is not easily defined, we find the description of outrageous conduct set forth in the *Restatement (Second) of Torts*, § 46, Comment d (1965) instructive:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

See also Goldfarb v. Baker, 547 S.W.2d 567, 568-69 (Tenn. 1977); *Blair v. Allied Maintenance Corp.*, 756 S.W.2d 267, 273 (Tenn. App. 1988); *Bryan v. Campbell*, 720 S.W.2d 62, 64-65 (Tenn. App. 1964). Whether the defendant's conduct is so extreme and outrageous as to permit recovery is, in the first instance, a question for the court to determine. *Alexander v. Inman*, 825 S.W.2d 102 (Tenn. App. 1991) (citing *Medlin*, 217 Tenn. at 481, 398 S.W.2d at 275).

Omer's alleged actions are not so extreme as to go beyond the bounds of decency. None of Omer's alleged conduct was directed toward, or directly affected, Robinson. Thus, even if it is true, as Robinson alleges, that Omer reported Lineberry's videotaping activities to the Attorney General because Lineberry reported Omer to the TBPR, all of which resulted in Robinson's role in the videotaping being exposed, such conduct is not "outrageous," particularly as it affected Robinson. *Gann v. Key*, 758 S.W.2d 538, 543 (Tenn. App. 1988). Based upon the record before us, we hold that Robinson has not substantiated his claim of outrageous conduct.

IV.

The final question Robinson raises is whether the trial court erred in granting Omer's motion for summary judgment as to Robinson's claim of invasion of privacy. Tennessee courts recognize a cause of action for invasion of privacy. *Martin v. Senators, Inc.*, 220 Tenn. 465, 469, 418 S.W.2d 660, 662; *Langford v. Vanderbilt University*, 199 Tenn. 389, 401, 287 S.W.2d 32, 38 (1956); *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 132 (E.D. Tenn. 1981). In order to state a cause of action for invasion of privacy under the tort of public disclosure of private facts, a plaintiff must establish the following:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Restatement (Second) of Torts, § 652D (1977); *Beard*, 517 F. Supp. at 132.

Robinson claims that, by informing Thompson of Lineberry's activities, Omer made public private facts about Robinson. Initially, we note that there is no proof in the record that Omer publicized any facts about Robinson. The record is clear that, although Thompson deduced that a third party was involved as cameraman, Thompson did not learn from Omer that Robinson was that person.³ Furthermore, reporting what one believes to be illegal activity to an attorney general does not necessarily constitute "publicizing" private facts. In *Beard*, the court explained: "[E]ssential to recovery is a showing of a public disclosure of private facts. Communication to a single individual or to a small group of people, absent breach of contract, trust, or other confidential relationship, will not give rise to liability." *Id.* at 132. There is no evidence that Robinson and Omer had an attorney-client or any other fiduciary relationship.⁴ Based on the foregoing, we hold that the trial court acted properly in granting Omer's motion for summary judgment with regard to Robinson's claim of invasion of privacy.

Accordingly, the order of the trial court granting summary judgment to defendant on

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Thompson testified in his deposition that he did not recall how Robinson's role in the videotaping came to his attention. Omer testified that he did not know Robinson was the cameraman; in fact, he only informed Thompson of a single lingerie party hosted by Lineberry.

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Whether Omer breached a legal or ethical duty to Lineberry, a former client, is not a question before this Court.

plaintiff's negligent misrepresentation cause of action is reversed, and in all other respects this order is affirmed. The case is remanded to the trial court for further proceedings as are necessary. Costs of appeal are taxed to the appellee.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE